

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT,
17.74.343, the adoption of New Rules I)	ADOPTION, AND REPEAL
through XIX, and the repeal of ARM)	
17.74.302, 17.74.303, 17.74.307 through)	(ASBESTOS CONTROL)
17.74.310, 17.74.314 through 17.74.319,)	
17.74.325 through 17.74.331, 17.74.335)	
through 17.74.338, 17.74.341 and)	
17.74.342 pertaining to the asbestos)	
control program)	
)	

TO: All Concerned Persons

1. On January 26, 2006, the Department of Environmental Quality published MAR Notice No. 17-242 regarding a notice of public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 125, 2006 Montana Administrative Register, issue number 2.

2. The department has amended ARM 17.74.343, adopted New Rules IV (17.74.353), V (17.74.354), VI (17.74.355), VII (17.74.356), VIII (17.74.357), IX (17.74.358), X (17.74.359), XI (17.74.360), XII (17.74.361), XIII (17.74.362), XVI (17.74.365), XVII (17.74.366), XVIII (17.74.367), and XIX (17.74.368), and repealed ARM 17.74.302, 17.74.307 through 17.74.310, 17.74.314 through 17.74.319, 17.74.325 through 17.74.331, 17.74.335 through 17.74.338, 17.74.341, and 17.74.342 exactly as proposed. The department is not repealing ARM 17.74.303 as proposed. The department has adopted New Rules I (17.74.350), II (17.74.351), III (17.74.352), XIV (17.74.363), and XV (17.74.364) as proposed, but with the following changes, new matter underlined; stricken matter interlined:

NEW RULE I (17.74.350) INCORPORATION BY REFERENCE --
PUBLICATION DATES (1) Unless expressly provided otherwise, whenever there is a reference in this subchapter to:

- (a) remains as proposed.
- (b) a section of the United States Code (USC), the reference is to the 2000 edition of the USC and Supplement 4 III (2002 2003); or
- (c) a section of the Montana Code Annotated (MCA), the reference is to the 2005 edition of the MCA; ~~or,~~
- ~~(d) a rule of another agency of the state of Montana, the reference is to the December 31, 2004, edition of the Administrative Rules of Montana (ARM).~~

NEW RULE II (17.74.351) INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the department adopts and incorporates by reference:

- (a) 40 CFR 61, subparts A and M, pertaining to national emission standards for hazardous air pollutants (NESHAPs) for asbestos, with the following exception:

(i) 40 CFR 61.145(a)(2) and (4) are is not incorporated by reference.

(b) and (c) remain as proposed.

(2) Copies of these materials may be obtained from the Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901. Copies of the CFR are available from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402, (202) 512-1800. The CFR can also be accessed electronically at <http://www.access.gpo.gov/nara/cfr/index.html> ~~www.gpoaccess.gov/cfr/index.html~~.

NEW RULE III (17.74.352) DEFINITIONS For purposes of this subchapter the following definitions apply:

(1) through (4) remain as proposed.

(5) "Asbestos project" has the meaning given in 75-2-502(3), MCA. "Pipe," as the term is used in this definition and 75-2-503(3), MCA, includes any coating or wrap made of regulated asbestos-containing material that partially or wholly surrounds covers the inner or outer surface of the pipe.

(6) through (36) remain as proposed.

NEW RULE XIV (17.74.363) RENEWAL OF ACCREDITATION (1) through (6) remain as proposed.

(7) An applicant for renewal of accreditation as instructor shall attend a refresher course:

(a) taught by another instructor; or

(b) taught by the instructor with three or more students.

NEW RULE XV (17.74.364) TRAINING PROVIDER REQUIREMENTS

(1) and (2) remain as proposed.

(3) For department approval of a training course, instructors' qualifications must include:

(a) remains as proposed.

(b) current accreditation in the course(s) they teach.

(i) A training provider who is accredited as a contractor/supervisor may teach the asbestos project worker course without current accreditation as an asbestos project worker.

(c) through (10) remain as proposed.

3. The following comments were received and appear with the department's responses:

COMMENT NO. 1: A commentor stated that the definition of "asbestos project" in New Rule III(5) should include a project that involves pipes made of, or covered with, asbestos. The commentor also stated that, although many pipes have asbestos wrap on the outside for heat insulation, asbestos covering may exist on the inside of pipes, because inserting new pipes and liners inside old corroded pipes is a common practice. The commentor suggested substituting the word "covers" for "surrounds" to assure that asbestos on the inside of pipes is a material covered by the program.

RESPONSE: The department agrees with the comment and has replaced "surrounds" with "covers the inner or outer surface of" in New Rule III(5).

COMMENT NO. 2: A commentor stated that, instead of repealing ARM 17.74.303 and completely deregulating homeowners who conduct an asbestos project within their residences, the department should replace the homeowner exemption in the rules with a program that requires education of homeowners about their risks and voluntary control options by means of a brochure disseminated by real estate agents to the buyer whenever an existing residence changes hands.

RESPONSE: In its notice of proposed rulemaking, the department proposed to repeal ARM 17.74.303, which provides an exemption from the asbestos rules, other than rules related to transportation and disposal of asbestos-containing material, for a homeowner conducting, on his or her own, an asbestos abatement project in his or her private residence, when the sole use of the residence is as the homeowner's domicile. With repeal of this rule, pursuant to the adoption and incorporation by reference of 40 CFR Part 61, subpart M, the National Emission Standard for Asbestos (asbestos NESHAP), in New Rule II(1)(a), based on the definition of "facility" in 40 CFR 61.141, the exemption would have been expanded to apply to residential buildings having four or fewer dwelling units.

The Asbestos Control Act does not authorize the department to adopt rules to create a mandatory education program. However, the asbestos control program does distribute many brochures concerning asbestos hazards and control, and maintains a web site (www.deq.mt.gov/asbestos.index.asp) that provides guidance to homeowners concerning testing, managing, and abating asbestos-containing materials.

In addition, the department has decided not to repeal ARM 17.74.303. Please see the response to comment no. 3.

COMMENT NO. 3: Several comments were received requesting that the department not repeal ARM 17.74.303.

RESPONSE: The department agrees with the comments and is not repealing ARM 17.74.303 at this time.

The rulemaking authority in the Asbestos Control Act, 75-2-503(1), MCA, directs the department to establish rules that are consistent with federal law. In this case, the federal law is 40 CFR Part 61, subpart M. ARM 17.74.303 contains additional requirements beyond those in the asbestos NESHAP. 40 CFR 61.141 and 40 CFR 61.145(a) of the asbestos NESHAP establish an exclusion for residential buildings having four or fewer dwelling units, and ARM 17.74.303 establishes exclusions for private homeowners conducting abatement projects in their private domicile. Therefore, retaining ARM 17.74.303 does not conflict with the Asbestos Control Act or the asbestos NESHAP.

The department does not currently have the resources to adequately regulate residential asbestos projects. However, the department will postpone, for approximately two years, any action regarding the repeal of ARM 17.74.303 to provide time for the department to further research the impact of retaining, modifying, or repealing the rule. The research regarding the repeal of ARM 17.74.303 will include the asbestos NESHAP compliance rate, the public and

commercial building asbestos project permit compliance rate, the residential (residential buildings having four or fewer dwelling units) renovation compliance rate, asbestos control program resources, revenue generated from residential asbestos abatement project permit issuance, and any other relevant factors.

COMMENT NO. 4: A commentor asked what is meant by the phrase "sufficient size" in relation to the sign, and the letters appearing on the sign, for a warning of asbestos danger, which is required by the Montana Asbestos Work Practices and Procedures Manual, as incorporated by reference in New Rule II(1)(c).

RESPONSE: 40 CFR 61.145(d)(1)(iii), incorporated by reference in New Rule II(1)(a), provides the dimensions and other requirements for the sign required for vehicles used to transport asbestos-containing material. The markings must:

(a) be displayed in such a manner and location that a person can easily read the legend;

(b) conform to the requirements for 51 cm x 36 cm (20 in x 14 in) upright format signs specified in 29 CFR 1910.145(d)(4) and 40 CFR 61.149(d)(1); and

(c) display the following legend in the lower panel with letter sizes and styles of a visibility at least equal to those specified in 40 CFR 61.149(d)(1).

Legend:

DANGER
ASBESTOS DUST HAZARD
CANCER AND LUNG DISEASE HAZARD
Authorized Personnel Only

Notation:

2.5 cm (1 inch) Sans Serif, Gothic or Block
2.5 cm (1 inch) Sans Serif, Gothic or Block
1.9 cm (3/4 inch) Sans Serif, Gothic or Block
14 Point Gothic

COMMENT NO. 5: A commentor asked why the word "appropriate" is part of the definitions of "appropriate protective clothing," and "appropriate respirator." The commentor stated that HEPA is an acronym, and the definition of "HEPA" doesn't make sense to the commentor. The commentor stated that "leak tight" refers to "dust tight," which is not defined. The commentor also stated that the rules should require that an "alternative work practice waiver" be submitted before it is implemented.

RESPONSE: The terms "appropriate protective clothing," "appropriate respirator," "HEPA," "leak tight," and "alternative work practice waiver" are defined in the Montana Asbestos Work Practices and Procedures Manual, which is incorporated by reference in New Rule II. The department believes the term "appropriate" helps clarify the fact that there are various types of protective clothing and respirators, only some of which are appropriate for use in an asbestos abatement proceeding.

The acronym "HEPA" appears only in the Montana Asbestos Work Practices and Procedures Manual, which relies on the definition of the term in 29 CFR

1926.1101(b). The department agrees with the comment concerning the use of the acronym and will include the full name – "high efficiency particulate air" – in the definition of "HEPA" found in that manual.

The definition of "leak tight" includes, in addition to "dust tight," the statement that leak tight "means that solids or liquids cannot escape or spill out." The department believes the definition of "leak tight," taken as a whole, is sufficiently clear in its meaning.

Regarding the comment that the rules should provide that an "alternative work practice waiver" be submitted before it is implemented, the department notes that the Montana Asbestos Work Practices and Procedures Manual requires the contractor to submit a request for such a waiver, and the department's approval of the request may be granted on a case-by-case basis only when the health, safety, and welfare of building occupants/persons are protected adequately by the alternative work practices. The department believes it is clear that such a waiver must be obtained before the "alternative work practices" are undertaken, and respectfully states that it believes no additional clarification is required.

COMMENT NO. 6: A commentor asked whether the phrase "seven calendar day notification period applies" means that a person has seven calendar days after completion of a project to notify the department.

RESPONSE: The phrase "seven calendar day notification period applies" is not used in any of the proposed new asbestos control rules, or in any existing asbestos control rules that are not proposed for repeal. However, it appears in section 4.0 of the Montana Asbestos Work Practices and Procedures Manual, which is incorporated by reference in New Rule II(1)(c). The manual states that a "seven calendar day notification period applies to those projects with a contract volume less than \$3,000." That statement is intended to explain how long it takes to obtain a permit under the Montana Asbestos Control Act, 75-2-503(2), MCA, which states, "for asbestos projects having a cost of \$3,000 or less, the department shall issue asbestos project permits within 7 calendar days following the receipt of a properly completed permit application and the appropriate fee." The department agrees that the use of the phrase "seven calendar day notification period applies" in the manual may be confusing, and therefore is replacing the second and third sentences in the second paragraph of section 4.0 of the manual with the following:

"Applications and fees for projects with a contract volume less than \$3,000 must be submitted at least seven calendar days prior to the anticipated starting date of the project to ensure that the permit is issued in time. Applications and fees for projects with a contract volume of \$3,000 or more must be submitted at least ten working days prior to the anticipated starting date of the project to ensure that the permit is issued in time."

COMMENT NO. 7: A commentor asked why the department can't take faxes of asbestos project notifications.

RESPONSE: The department will accept a legible fax of the "Application For a Montana Asbestos Abatement Project Permit and NESHAP Demolition/Renovation Notification" that is followed by prompt submittal of a hard copy.

COMMENT NO. 8: A commentor asked whether the department is authorized to require retention of asbestos project records for 30 years.

RESPONSE: The 30-year standard in New Rule XI(1) for retaining records is the same standard that was in ARM 17.74.341(2), which is being repealed. Also, the Montana Asbestos Abatement Project Permit issued by the department includes a 30-year recordkeeping condition that requires the permittee to:

"Maintain the following project documents for at least 30 years for recordkeeping and auditing purposes: Air clearance air sampling data including lab reports, field data, and the name of the person(s) collecting and analyzing the samples; Visual inspections; Waste Disposal Manifest; and other project documentation."

The department believes it is important to maintain a consistent recordkeeping standard for the asbestos control program. Therefore, the department is not amending the recordkeeping standard in New Rule XI(1).

COMMENT NO. 9: A commentor stated that the citation in New Rule II(1)(a)(i) to the asbestos NESHAPs being adopted and incorporated by reference should match the citation of the NESHAPs in New Rule IV(1)(a).

RESPONSE: The department agrees with the comment and has corrected the citation in New Rule II(1)(a)(i). The incorrect citation was an inadvertent drafting error.

COMMENT NO. 10: A commentor stated that New Rule XIV, "Renewal of Accreditation," states, and past practice implies, that asbestos inspectors are not able to conduct any inspections after their license has expired and before they receive their renewal accreditation from the department. The commentor stated that he and other inspectors have experienced delays of up to one month or more between the date of training and the receipt of accreditation from the department. The commentor stated that, when faced with many inspections, all on very tight timeframes, this has the potential to reduce productivity and delay projects.

The commentor proposed that the department change the rule to allow for a grace period during which inspectors may conduct inspections while waiting for a new accreditation card from the department. The commentor stated that a grace period of 30 days, depending upon the expedience of the Asbestos Control Program staff, should suffice. The commentor stated that the rule should state that inspections conducted after training has occurred, but before issuance of a replacement accreditation card, are allowed.

RESPONSE: The department believes it is inappropriate for asbestos inspectors with an expired license to conduct inspections. The department will address the timely issuance of renewals. However, the prohibition on asbestos-related work by persons whose accreditation has expired is based, in part, on the fact that U.S. Environmental Protection Agency (EPA) guidance does not allow it. Instead, the department encourages persons to attend a recertification course and re-apply for accreditation well in advance of accreditation expiration.

COMMENT NO. 11: The proposed repeal of ARM 17.74.303 and exclusion from the incorporation by reference in New Rule II of 40 CFR 61.145(2) and (4) is not in accordance with the DEQ's mission statement, the Montana Constitution or the Montana Code Annotated.

RESPONSE: The department intended to adopt and incorporate by reference 40 CFR 61.145(4). The department has corrected the citation in New Rule II(1)(a)(i). The incorrect citation was an inadvertent drafting error.

In addition, the department has decided not to repeal ARM 17.74.303. Please see the response to comment no. 3.

COMMENT NO. 12: A commentor stated that, if the department repeals ARM 17.74.303, it would result in loss of revenue for the asbestos abatement industry, which would result in higher costs for consumers.

RESPONSE: Please see the response to comment no. 3.

COMMENT NO. 13: A commentor stated that communication between the state's Asbestos Control Program and other levels of government is poor and that superiors and department heads are not sufficiently trained in asbestos-related disciplines.

The commentor asked whether the department is planning on dissolving its asbestos control program and turning responsibility for asbestos over to EPA.

RESPONSE: The comments are outside the scope of this rulemaking. However, the department responds as follows.

Department supervisors are expected to have working knowledge of the program(s) they manage. The type and degree of training needed depends upon the supervisor's experience and the number of programs managed. The department has no plans to return asbestos regulatory primacy to EPA.

The department made every effort to identify and notify interested parties of the proposed rulemaking.

COMMENT NO. 14: A commentor asked who is going to bear the litigation costs against the state and the asbestos industry with the repeal of ARM 17.74.303. The commentor stated that some homeowners have incurred great expense hiring asbestos abatement contractors to perform projects in residential property, whereas, under the proposed repeal of ARM 17.74.303 and incorporation by reference of the federal exemption for four or fewer residential dwelling units, the homeowners would not have been required to hire an asbestos abatement contractor to perform the work.

RESPONSE: Please see the response to comment no. 3.

COMMENT NO. 15: A commentor asked why the department already has adopted the new rules and the repeal of ARM 17.74.303. The commentor stated that he thought that the rulemaking process required a hearing prior to adoption or repeal of rules.

RESPONSE: After notice in the Montana Administrative Register and a separate notice to persons on the department's interested persons list, the

department conducted a public rulemaking hearing on March 6, 2006. The department also accepted written comments through March 13, 2006. The department made several revisions to the proposed rulemaking based on comments, and the department decided not to repeal ARM 17.74.303. Please see the response to comment no. 3. The department had not finalized the rulemaking as of the date of the comment. Pursuant to Montana law, adoption of the proposed new rules will be effective one day after this Notice of Amendment, Adoption, and Repeal has been published in the Montana Administrative Register by the Secretary of State.

COMMENT NO. 16: A commentor stated that, if the department repealed ARM 17.74.303, it would lose a business opportunity. The commentor said that the state should conduct a survey or other research to see how much money could be generated by enforcement of the existing requirements, which could allow hiring of more enforcement staff.

RESPONSE: All funds collected from asbestos-related enforcement activities are deposited in the state's general fund. As of this date, the legislature has not given the department authority to hire additional staff. Also, the department has decided not to repeal ARM 17.74.303. Please see the response to comment no. 3.

COMMENT NO. 17: A commentor asked whether previously-approved training courses will be grandfathered under the new rules.

RESPONSE: Previously-approved training courses will be valid under the new rules.

COMMENT NO. 18: A commentor stated that New Rule XIV, concerning renewal of accreditation, should allow a training provider to obtain renewal of accreditation as an instructor by presenting a refresher course rather than having to attend a refresher course taught by another instructor.

RESPONSE: The department agrees with the comment and has amended New Rule XIV.

COMMENT NO. 19: A commentor stated that New Rule XV should be revised to allow a training provider who is accredited as a contractor/supervisor to teach the worker course without accreditation in that occupation.

RESPONSE: The department agrees with the comment and has amended New Rule XV.

COMMENT NO. 20: The department commented that the edition of the United States Code in New Rule I(1)(b) is outdated, the incorporation by reference of the Administrative Rules of Montana in New Rule I(1)(d) is unnecessary, and the e-mail address for Government Printing Office in New Rule II(2) has been changed.

RESPONSE: The department has amended New Rules I and II.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

By: /s/ Richard H. Opper
RICHARD H. OPPER
Director

Certified to the Secretary of State, June 12, 2006.